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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 131212999-3999-01]

RIN 0648- BD84

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Extension of Emergency Fishery Closure Due to the Presence of the Toxin that Causes Paralytic Shellfish Poisoning

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency action; extension of effective period and expansion; request for comments.

SUMMARY: This temporary rule extends a closure of Federal waters for one year, through December 31, 2014. It also expands the list of species prohibited for harvest under this closure to include gastropods, commonly referred to as whelks, conchs, and snails. This temporary rule, first published in 2005, has been subsequently extended several times at the request of the U.S. Food and Drug Administration. This action also includes a correction to exclude the Federal waters west of 70 degrees West longitude.

DATES: This action extends the closure for one year, effective January 1, 2014, through December 31, 2014. Comments must be received on any part of this action by [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2011-0260, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2011-0260, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- Fax: (978) 281-9177, Attn: Jason Berthiaume.

- Mail: John K. Bullard, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: “Comments on PSP Closure.”

Instructions: All comments received are part of the public record and will generally be posted to www.regulations.gov without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted via Microsoft Word, Microsoft Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone: (978) 281-9177, fax: (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

On June 10, 2005, the U.S. Food and Drug Administration (FDA) requested that NMFS close an area of Federal waters off the coasts of New Hampshire and Massachusetts to fishing for

bivalve shellfish intended for human consumption due to the presence in those waters of toxins (saxotoxins) that cause Paralytic Shellfish Poisoning (PSP). These toxins are produced by the alga Alexandrium fundyense, which can form blooms commonly referred to as red tides. Red tide blooms, also known as harmful algal blooms (HABs), can produce toxins that accumulate in filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death from PSP.

On June 16, 2005, NMFS published an emergency rule (70 FR 35047) closing the area recommended by the FDA (i.e., the Temporary PSP Closure Area). Since 2005, the closure has been extended several times and the area has been expanded and divided into northern and southern components. The Northern Temporary PSP Closure Area remained closed to the harvest of all bivalve molluscan shellfish, while the Southern Temporary PSP Closure Area was reopened to the harvest of Atlantic surfclams, ocean quahogs, and sea scallop adductor muscles harvested and shucked at sea. The current closure will expire on December 31, 2013, and this action extends this closure for one additional year, through December 31, 2014.

In addition, this emergency rule also prohibits the harvest of gastropods from the Temporary PSP Closure Areas. As discussed above, these areas are currently closed to the harvest of bivalves, but the closure does not include gastropods. Gastropods include carnivorous snails, conchs, and whelks that feed on bivalves. The bivalves, if contaminated with the toxin that causes PSP, transfer the toxins on to the gastropod. While there are few data available on how susceptible gastropods are to PSP, the available evidence suggests that gastropods typically have higher levels of the PSP toxin and retain it longer than bivalves taken from the same waters.

NMFS has recently received information that there is a developing Federal waters whelk fishery seeking to target the northern component of the Temporary PSP Closure to harvest

whelks. While there has been a state waters whelk fishery in recent past, there have been few available data regarding a Federal waters fishery. The data that are available indicate that there is a Federal waters fishery, primarily Massachusetts based, where the PSP Closed Areas cover a large portion of the Massachusetts coast line. The FDA, in collaboration with the Commonwealth of Massachusetts Division of Marine Fisheries and Department of Public Health, have been actively investigating this issue, and, on October 29, 2013, the FDA and the Massachusetts Division of Marine Fisheries and Department of Public Health advised NMFS to expand the Temporary PSP Closures to also include a prohibition on the harvest of gastropods while the matter is being researched. On November 26, 2013, NMFS received a letter from the FDA, formalizing its request that NMFS modify the Temporary PSP Closures to also include a prohibition on the harvest of gastropods. Based on these recommendations, this action will prohibit the harvest and possession of gastropods from the areas currently defined as the Temporary PSP Closed Areas. The FDA is actively working on this and they have informed NMFS that they will continue to look into this issue. Therefore, until NMFS is directed otherwise by the FDA, the Temporary PSP Closed Areas will also include a prohibition on gastropod harvesting. As such, NMFS is seeking comments on the gastropod fishery, the PSP closure, and the susceptibility of gastropods and PSP.

The boundaries of the northern component of the Temporary PSP Closure Area comprise Federal waters bounded by the following coordinates specified in Table 1 below. Under this emergency rule, this area remains closed to the harvest of Atlantic surfclams, ocean quahogs, and whole or roe-on scallops, and also now includes gastropods.

Table 1: Coordinates for the Northern Temporary PSP Closure Area

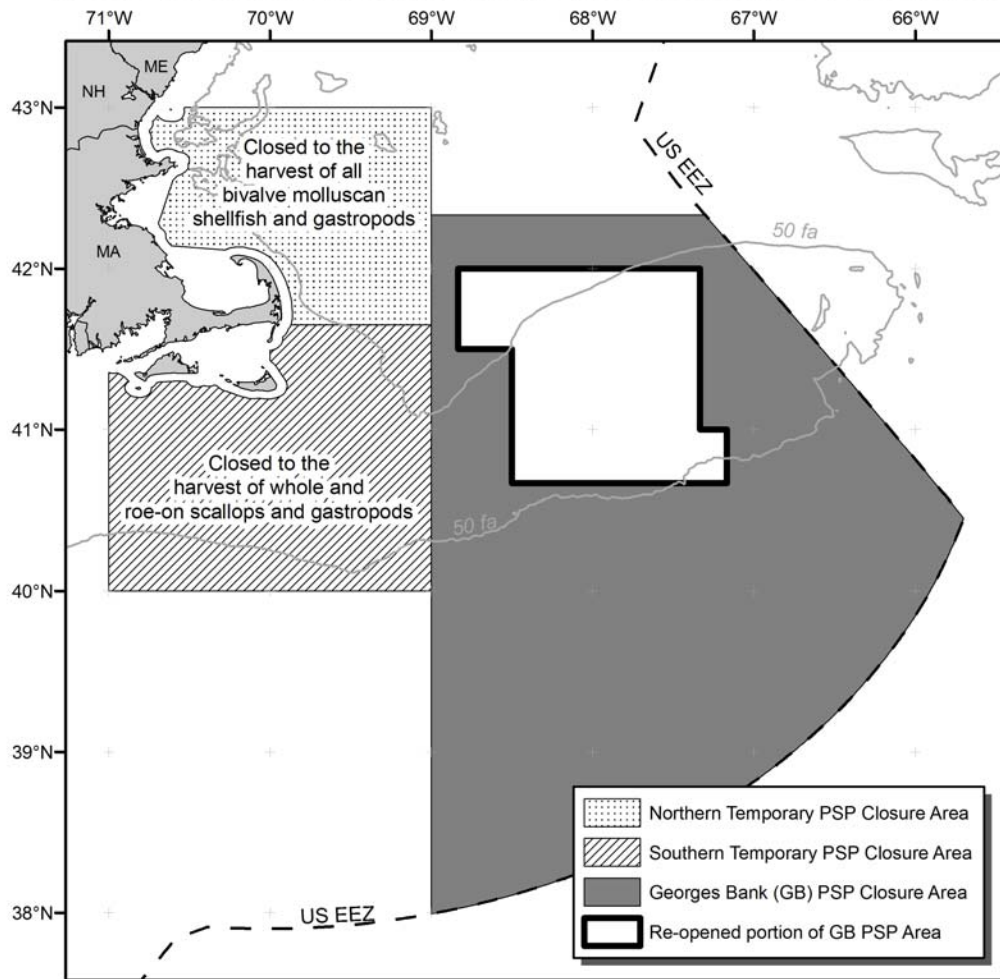
Point	Latitude	Longitude
1	43° 00' N	71° 00' W
2	43° 00' N	69° 00' W
3	41° 39' N	69° 00' W
4	41° 39' N	71° 00' W
5	43° 00' N	71° 00' W

The boundaries of the southern component of the Temporary PSP Closure Area comprise Federal waters bound by the following coordinates specified in Table 2. Under this emergency rule, the Southern Temporary PSP Closure Area remains closed to the harvest of whole or roe-on scallops, and now also includes gastropods.

Table 2: Coordinates for the Southern Temporary PSP Closure Area

Point	Latitude	Longitude
1	41° 39' N	71° 00' W
2	41° 39' N	69° 00' W
3	40° 00' N	69° 00' W
4	40° 00' N	71° 00' W
5	41° 39' N	71° 00' W

Northern and Southern Temporary Paralytic Shellfish Poison (PSP) Closure Areas



This notice also corrects and clarifies the coordinates in the regulatory text to exclude the area known as Nantucket Shoals (also referred to as pocket waters) from the closure. The Magnuson-Stevens Fishery Conservation and Management Act provides the Commonwealth of Massachusetts with the authority to manage the Federal waters in this area west of the 70 degrees West longitude. This change is a technical correction and will have no effects on fisheries because Massachusetts already exercises its authority in this area.

Classification

Pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(c) the Assistant Administrator for Fisheries, NOAA, has determined that this emergency action is consistent with the provisions of the Magnuson-Stevens Act, and other applicable law. Section 305 of the Magnuson-Stevens Act authorizes the Secretary to act if (1) the Secretary finds that an emergency involving a fishery exists; or (2) the Secretary finds that interim measures are needed to reduce overfishing in any fishery; or (3) if the Council finds one of those factors exists and requests that the Secretary act; or (4) to respond to a public health emergency or an oil spill. Where such circumstances exist, the Secretary may promulgate emergency rules or interim measures “to address the emergency or overfishing” (16 U.S.C. 1855(c)(1) and (2)). The Secretary has delegated this authority to NMFS. Further, NMFS has issued guidance defining when “an emergency” involving a fishery exists (62 FR 44421; August 21, 1997). This guidance defines an emergency as a situation that (1) arose from recent, unforeseen events, (2) presents a serious management problem in the fishery, and (3) can be addressed through interim emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and the deliberative consideration of the impacts on participants to the same extent as would be expected under the

formal rulemaking process. Therefore, the rationale for an emergency as provided in the preamble of this rule, justifies this rule as an emergency and interim action according to the statutes and guidance as cited above.

Pursuant to section 5 U.S.C. 553(b)(B) of the Administrative Procedure Act, the Assistant Administrator for Fisheries finds there is good cause to waive prior notice and an opportunity for public comment on this action as notice and comment would be impracticable and contrary to the public interest due to a public health emergency. This action prohibits the harvest and possession of gastropods from the areas referred to as the Temporary PSP Closed Areas, which have been closed to bivalve fishing since 2005. NMFS has recently received information that the whelk fishery is a new and potentially expanding fishery in Federal waters, possibly targeting the northern component of the Temporary PSP Closure Area to harvest whelks. Based on available data, whelk are susceptible to PSP as they can ingest bivalves contaminated with the toxins that cause PSP, transferring the toxins on to the gastropod. As such, since the current closure does not include gastropods, there is risk of gastropods contaminated with PSP entering the market for human consumption. As such, to protect public health it is in the best interest of the public as well as the developing whelk fishery to have this action in place as soon as possible. Thus, there is good cause to waive prior notice and an opportunity for public comment on this action as notice and comment would be impracticable and contrary to the public interest due to a public health emergency.

In regards to the closure extension, public comment has been solicited concurrently with each of the extensions of this action, as detailed and responded to below. Under section 553(d)(3), there is good cause to waive the 30-day delay in effectiveness due to a public health emergency. The original emergency closure was in response to a public health emergency.

Toxic algal blooms are responsible for the marine toxin that causes PSP in persons consuming affected shellfish. People have become seriously ill and some have died from consuming affected shellfish under similar circumstances. Pursuant to section 305(c)(3)(C) of the Magnuson-Stevens Act, the closure to the harvest of shellfish, as modified on September 9, 2005, and re-instated on October 18, 2005, may remain in effect until the circumstances that created the emergency no longer exist, provided the public has had an opportunity to comment after the regulation was published, and, in the case of a public health emergency, the Secretary of Health and Human Services concurs with the Commerce Secretary's action. During the initial comment period, June 16, 2005, through August 1, 2005, no comments were received. Two comments were received after the re-opening of the southern component of the Temporary PSP Closure Area on September 9, 2005. One commenter described the overall poor quality of water in Boston Harbor, but provided no evidence to back these claims. The other commenter expressed reluctance to re-opening a portion of the closure area without seeing the results of the FDA tests. Data used to make determinations regarding closing and opening of areas to certain types of fishing activity are collected from Federal, state, and private laboratories. NOAA maintains a Red Tide Information Center (<http://oceanservice.noaa.gov/redtide>) which can be accessed directly or through the website listed in the ADDRESSES section. Information on test results, modeling of algal bloom movement, and general background on red tides can be accessed through this information center. While NMFS is the agency with the authority to promulgate the emergency regulations, NMFS defers to the FDA in promulgating such regulations when in regard to public health. The FDA requested that NMFS lift a portion of the closure after the FDA determined that the area was safe. Based on this recommendation, NMFS lifted a portion of the closure on September 9, 2005. If necessary, the regulations may be

terminated at an earlier date, pursuant to section 305(c)(3)(D) of the Magnuson-Stevens Act, by publication in the Federal Register of a notice of termination, or extended further to ensure the safety of human health.

This emergency action is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

This rule is not significant for the purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 20, 2013

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended to read as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 648.14, paragraphs (a)(10)(iii) and (iv) are added to read as follows:

§ 648.14 Prohibitions.

(a) ***

(10) ***

(iii) Fish for, harvest, catch, possess or attempt to fish for, harvest, catch, or possess any bivalve shellfish, including Atlantic surfclams, ocean quahogs, and mussels, with the exception of sea scallops harvested only for adductor muscles and shucked at sea, and any gastropods, including whelks, conchs, and carnivorous snails, unless issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing the collection of shellfish and/or gastropods for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(A) 43° 00' N. lat., 71° 00' W. long.;

(B) 43° 00' N. lat., 69° 00' W. long.;

(C) 41° 39' N. lat., 69° 00' W. long.;

(D) 41° 39' N. lat., 71° 00' W. long.; and then ending at the first point.

(iv) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess any sea scallops, except for sea scallops harvested only for adductor muscles and shucked at sea, and any gastropods, including whelks, conchs, and carnivorous snails, unless issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing collection of shellfish and/or gastropods for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated below, excluding the Federal waters of Nantucket Sound west of 70° 00' W. Longitude:

(A) 41° 39' N. lat., 71° 00' W. long.;

(B) 41° 39' N. lat., 69° 00' W. long.;

(C) 40° 00' N. lat., 69° 00' W. long.;

(D) 40° 00' N. lat., 71° 00' W. long.; and then ending at the first point.

[FR Doc. 2013-30945 Filed 12/26/2013 at 8:45 am; Publication Date: 12/27/2013]